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AUTHOR	Freedman, Miriam Kurtzig
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ABSTRACT

This brief paper summarizes legal requirements for non-standard accommodations for students with special needs or disabilities in educational assessments based on the Individuals with Disabilities Education Act (IDEA) and Section 504 of the 1973 Rehabilitation Act. After noting that all students have due process rights under the 14th Amendment, the paper addresses the following topics: (1) test validity; (2) accommodations and modifications for children with disabilities; (3) the different views of accommodations and modifications as defined by the IDEA and psychometrists; (4) the responsibility of states and districts to set standards and develop fair and valid tests; (5) the mistaken view that the law requires that standards be fundamentally altered or lowered in order to accommodate children with disabilities; (6) the mistaken view that the law requires that students are automatically entitled to use Individualized Education Program accommodations on state tests; and (7) the mistaken view that it is unlawful to test a student in his or her area of disability, if that is what the test is designed to measure. (DB)

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NON-STANDARD ACCOMMODATIONS (HEREINAFTER CALLED MODIFICATIONS): JUST THE LEGAL BASICS

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TO: **Interested parties**
FROM: **Miriam Kurtzig Freedman, M.A., J.D.**
Miriamkfreedman@aol.com
DATE: **June 26, 2001**

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NOTE: These requirements are **in addition** to the 14th Amendment due process rights which ALL students have. These include adequate notice before high stakes testing and a "fair test," one which measures what the students have had the opportunity to learn. That is, a test which is aligned with the standards and curriculum taught in the schools.

1. **Test validity.** Both IDEA and Section 504 regulations require that tests be validated for their stated purpose and be administered according to the directions of the test producer. Section 504 regulation 104.35 (a)(1); IDEA regulation 300.532(c)(1)(i). The IDEA specifies that--if scores are not administered according to the test producer's instruction--the test report include how the test was administered. 300.532(c)(2).

2. **Accommodations and modifications for children with disabilities.** Stakeholders in the state should reach some consensus on what they will call changes in how a test is given, timed, scheduled, presented, and how a student responds. It is critical that one word is used for changes which "do not fundamentally alter what the test measures or the comparability of scores. And a different word is used for those changes which do fundamentally alter…

   I like the terms "accommodations" and "modifications," and will use them consistently in this Memorandum.

   Lack of precision and clarity is confusing to all stakeholders, needlessly complicates the high stake testing effort, and leads to disputes and battles that need not have been fought.

   There in NO legal requirement that all states allow the same accommodations. **Each test is different.** Thus, on some tests a reader is allowed; on others, it is not. On some, extra time or Braille is allowed--on others it is not. ETC. This is as it should be. Each test producer is required to determine what its validity measures are, to provide appropriate accommodations, and, when questioned, to be able to explain the above two requirements in a rational way. The test producer must provide a rationale for its decisions. It cannot merely make a conclusory statement

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that this is how it is; the courts have said, a mere *ipse dixit* ("because it is said") will not do.

Looking for a universal--one size fits all--set of allowed accommodations leads us on a wrong path. In fact, unless all tests are the same, such would not make sense.

If the test maker has no rationale or supportive data for which accommodations are allowed and which are not, then the test is not ready for a high stakes arena. The issue, however, is a **pedagogical**, **psychometric** one--not a legal one. It is important that we not the legal arena to solve psychometric problems. Doing so will further confuse the issues and lead to unmanageable outcomes--and lots of litigation.

3. **The IDEA does not define accommodations and modifications as psychometrists do and as these terms are generally understood in the testing industry.** The IDEA requires that students receive accommodations or modifications in order to have access and an equal opportunity. However, the IDEA does not define either term. Recently, OSEP and the Office for Elementary and Secondary Education (OESE) clarified that the terms as used in the IDEA do not reflect the growing consensus on the psychometric meanings of these words. See the January 12, 2001 Clarification by OSEP and OESE.

4. **States and districts are charged with setting standards and developing fair and valid tests.** Our Constitution, especially through the 10th Amendment, provides that education is left to the states and to the people (not the federal government). Thus, the Constitution contemplates at least 50 different ways of testing and accommodating students with disabilities. Add onto that the local testing programs, and it becomes clear that legally we do need not seek a unitary model.

   If a state's testing program lack the requisite clarity or provides accommodations/ modifications inappropriately, it may forfeit the concept of test validity. In such a case, the courts will interpret the state's actions--and will not substitute their judgment for the state's. It's like the Pyramid of Laws. Thus, getting this right is very critical.

5. **There is no federal requirement that standards be fundamentally altered or lowered in order to accommodate children with disablities.** In fact, the IDEA, Section 504, the ADA, and a long line of cases-- **are quite the opposite.**

6. **There is no federal requirement that students are automatically entitled to use their IEP accommodations on the state tests.** While some states now allow this, this practice confuses the role of the IEP team and the role of the test producer (such as the state) **(unless IEP teams have been well-trained and are in fact considering test validity requirements in their IEPs and not allowing**

modifications, unless parents are explicitly informed about their consequences). While the IEP team determines what a student **needs** in order to access the program, it does NOT determine what a student can use as an **accommodation** on a state test. That determination is the test producer's to make.

If the IEP team wishes to allow modifications, then it can so, and neither the LEA nor SEA can interfere with that determination. However, in such a case, the IEP team must discuss these consequences and the IEP should state that the change in the test is a modification which fundamentally alters the test and invalidates the test results. This assures that the parents receive all the information they need in order to make an **informed** decision, as they are now entitled to. IDEA regulation 300.500(a)(1)(i).

7. **It is NOT unlawful to test a student in his area of disability, if that is what the test is designed to measure.** Both the IDEA and Section 504 specifically allow for that. Section 504 Regulation, 104.35; IDEA regulation 300.532(e).